Supreme Court, U.S.
FILED
APR 15 2015
OFFICE OF THE CLERK

No. 14-275

IN THE
Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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April 15, 2015

RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. THE RAISIN MARKETING ORDER WORKS A PHYSICAL TAKING FOR WHICH JUST COMPENSATION IS CATEGORICALLY REQUIRED. 2

A. The Government's Novel Theories Are Inconsistent With This Court's Physical Takings Precedent. 2

B. The Government Cannot Recast The Forced Physical Transfer Of Raisins As A Voluntary Exchange. 8

C. The Order Does Not Provide Compensation To Growers. 13

II. THE GOVERNMENT'S ALTERNATIVE MERITS ARGUMENTS FAIL. 17

III. THE PROPER REMEDY IS TO REVERSE. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Arkansas Game & Fish Commission v. United States,
133 S. Ct. 511 (2012) 7

Bowen v. Gilliard,
483 U.S. 587 (1987) 8

Dolan v. City of Tigard,
512 U.S. 374 (1994) 7, 11, 12, 20

Dugan v. Rank,
372 U.S. 609 (1963) 5

Duke Power Co. v. Carolina Environmental Study Group, Inc.,
438 U.S. 59 (1978) 19

Eastern Enterprises v. Apfel,
524 U.S. 498 (1988) 21

Gorman v. Wolpoff & Abramson, LLP,
584 F.3d 1147 (9th Cir. 2009) 18

Hodel v. Irving,
481 U.S. 704 (1987) 21

Horne v. USDA,
133 S. Ct. 2053 (2013) 18, 19, 20

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 21

Koontz v. St. Johns River Water Management District,
133 S. Ct. 2586 (2013) 5, 9, 10

Limelight Networks, Inc. v. Akamai Technologies, Inc., 134 S. Ct. 2111 (2014) 19

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 7

Lion Raisins, Inc. v. United States, 416 F.3d 1356 (Fed. Cir. 2005) 4

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 3, 4, 7, 9, 11

Missouri Pacific Railway Co. v. Nebraska, 217 U.S. 196 (1910) 20, 21, 22

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 7, 9, 10, 11, 12

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 6, 8

Philip Morris, Inc. v. Harshbarger, 159 F.3d 670 (1st Cir. 1998) 10

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 8

Roberts v. Galen of Virginia, Inc., 525 U.S. 249 (1999) 19

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 10, 11

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 5

United States v. Causby, 328 U.S. 256 (1946) 7

United States v. General Motors Corp.,
323 U.S. 373 (1945) 3

Village of Norwood v. Baker,
172 U.S. 269 (1898) 20, 21, 23

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 5

West v. Gibson,
527 U.S. 212 (1999) 19

Wilkie v. Robbins,
551 U.S. 537 (2007) 22

Yee v. City of Escondido,
503 U.S. 519 (1992) 10, 11

Statutes and Regulations

28 U.S.C. § 1491(a) 17

7 C.F.R. § 989.166(c) 22

7 C.F.R. § 989.53(a) 4

7 C.F.R. § 989.66(h) 4

7 U.S.C. § 608c(14) 18

7 U.S.C. § 608c(6)(E) 4

S. Ct. R. 24 19

Other Authorities

French, Ben C. & Nuckton, Carole Frank,
An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins, Am. J. Agric. Econ. 581 (1991) 14, 15

Magna Carta,
reprinted in A.E. Dick Howard, *Magna Carta: Text and Commentary* (1964) 5

Malcolm, Dan,
California Raisin Growers Benefit from Sun-Maid Work, Am. Vineyard, Jan. 2015.....16

Neff, Steven A. & Plato, Gerald E.,
United States Department of Agriculture, Federal Marketing Orders and Federal Research and Promotion Programs (1995).....16

Sun-Maid Sends Initiative to Eliminate the Raisin Reserve, Am. Vineyard, Jan. 2015.....16

United States Department of Agriculture,
Nectarines and Fresh Peaches Grown in California; Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011).....17

INTRODUCTION

The government's response all but concedes the main issues in this case. The government does not disagree that a "'permanent physical occupation' ... warrants a categorical rule" of just compensation. Gov't Br. 24. The government acknowledged throughout this litigation, as recently as oral argument in this Court in *Horne I* (though now it equivocates, *id.* at 25 n.2) — that the Raisin Marketing Order is not just a physical occupation but an actual transfer of title of reserve-tonnage raisins to the Raisin Administrative Committee ("RAC"). Nor does the government disagree in principle that fines for refusal to accede to an uncompensated taking "'rise[] or fall[]'" with the taking itself. *Id.* at 47. These points of agreement should dispose of both the attempted seizure of raisins and the fines imposed on the Hornes for refusing to turn them over.

In asserting nonetheless that there is no taking, the government leaves much of the Ninth Circuit's analysis undefended. It abandons the panel's holding that the Hornes' decision to challenge the taking under the Agricultural Marketing Agreement Act ("AMAA") instead of handing over the raisins or paying the fines renders per se taking analysis unavailable. *See* Pet. Br. 27-31. It ignores the panel's theory that per se takings analysis applies only to real, and not to personal, property. Instead, it substitutes a novel argument, never before made in this litigation, that "fungible commodities" can be taken and sold by the government with less than just compensation so long as the owner is given a theoretical residual claim on some of the proceeds.

The government largely avoids the panel's theory that the RAC's appropriation of reserve raisins for its own account is a mere "use restriction," but it substitutes a broader argument that the government may demand the uncompensated transfer of private property in return for creating an "orderly market." Most of all, the government cites inapposite cases from various contexts in an attempt to make murky the clearest principle of Takings Clause jurisprudence: that when the government takes actual ownership of private property it has a categorical constitutional obligation to pay for it.

The government's alternative merits theory based on the Tucker Act was forfeited long ago, and in any event has no relevance to the Hornes, who are not seeking compensation for an accomplished taking but rather asserting constitutional defenses to an order that would be an uncompensated taking. And the government ultimately has no basis for any remedy other than that proposed by the Hornes: to reverse the USDA's enforcement order.

ARGUMENT

I. THE RAISIN MARKETING ORDER WORKS A PHYSICAL TAKING FOR WHICH JUST COMPENSATION IS CATEGORICALLY REQUIRED.

A. The Government's Novel Theories Are Inconsistent With This Court's Physical Takings Precedent.

The government does not dispute that government action which permanently deprives an owner of the right "'to possess, use and dispose of" his property and hands that right over to the United

States is a per se taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). Instead, the government argues the rule should not apply here "[b]ecause reserve raisins are a fungible commodity, useful to their owners only by generating revenue." Gov't Br. 27. "Unlike real property or unique personal property," according to the government, owners of raisins and other fungible commodities have little interest in "lasting possession and control" of their property. *Id.* at 17, 26-27. The government therefore claims that the "most essential property right" in the raisins and the interest that matters for Fifth Amendment purposes is "the right to receive net proceeds from the" raisins' sale, which the government believes the Marketing Order preserves. *Id.* at 23.

The devil is in the concept of "net proceeds," which finds no support in the precedents of this Court. The term presupposes that the government has sold the "fungible commodity," producing revenues. If the government remits the market value to the owner, the Fifth Amendment will be satisfied — not because there was no taking, but because there was just compensation. But the government is not free to give the commodity away, sell it for less than market value, or divert the proceeds for its own purposes, and then claim there was no taking because whatever might be left (even if nothing) is returned to the owner. That uncabined notion of "net proceeds" is simply a license to take saleable goods without just compensation.

The marketing order entails a complete transfer of ownership. As the district court explained, "[t]itle to the 'reserve tonnage' portion of the producer's raisins automatically transfers to the RAC[.]" Pet. App. 179a; *see Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1369 n.9 (Fed. Cir. 2005) ("[O]nce the raisins [a]re transferred to the RAC, [the producer] no longer ha[s] a property interest in the raisins themselves[.]"). After the transfer, the RAC has full power to sell the raisins, use them, or give them away. As the Ninth Circuit put it, the RAC gains full "possessory and dispositional control." Pet.App. 25a-26a.

The forced transfer of the reserve raisins to the RAC "chops through" and "destroys" the entire bundle of property rights, including growers' "treasured" right to dispose of raisins as they think best and to receive the full proceeds from their sale. *See Loretto*, 458 U.S. at 435. In lieu of raisins the owners receive a different species of property: a contingent pro rata interest in the pool of money left over after the RAC sells or otherwise disposes of all the reserve raisins and uses the proceeds as it sees fit. *See Lion Raisins*, 416 F.3d at 1369 n.9; 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h). That contingent interest is legally significant only insofar as it might constitute partial compensation for the property taken. If the remittance were equal to the value of the confiscated raisins, then the Fifth Amendment would be satisfied.[1] If not, there has been an uncompensated taking.

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[1] We address below, at 13-17, the government's separate claim that the remittances in this case, even if zero, do constitute just

Fungible commodities are no different than any other form of private property. This Court has applied per se takings rules to appropriations of money, the archetypal fungible property, *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) ("[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest ... a 'per se takings approach' is the proper mode of analysis[.]") (alteration omitted), and of water, *see Dugan v. Rank*, 372 U.S. 609 (1963). Magna Carta, the venerable precursor to the Fifth Amendment, specifically referred to corn. Magna Carta, ch. 28 (1215), *reprinted in* A.E. Dick Howard, *Magna Carta: Text and Commentary* (1964). The government's claim that no taking has occurred when it confiscates fungible commodities and remits less than their value would violate this Court's rule that when the government takes an interest in property, it does not matter that the owner might retain some of the property's economic value. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002). It would also effectively replace the Takings Clause's categorical compensation protections with a phantom right allowing the government to take property — or at least "fungible commodities" — with little more than a promise of *inadequate* compensation.

The government is mistaken that commodity owners have little interest in the "possession and

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compensation — a claim the Ninth Circuit rejected. Pet.App. 22a n.16.

control" of their property. Gov't Br. 27. Farmers actively and creatively seek new markets and use their wits to maximize the value of their product. A producer, if allowed to decide how to dispose of his raisins, could choose to hold back some raisins for sale next year when the producer anticipates prices will be higher. *Cf. id.* at 42. Dispositional control likewise allows a producer to target high-value markets where geography or business relationships offer a competitive advantage.

The government never acknowledges the sweeping nature of its theory. Most agricultural and commercial goods — corn, t-shirts, cars, smartphones — are in a sense "fungible" and "useful to" the businesses that deal in them "only by generating revenue." *Id.* at 27. Those goods are not unique or laden with emotional attachment. Adopting the government's rule would thus exclude almost all such goods (not to mention an array of intangible property, potentially including securities and negotiable instruments) from the Takings Clause's categorical protections. Only the relatively thin protections of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), would stand between Apple and a government demand that it give the government every third iPhone.

Equally problematic is the government's claim that a categorical taking occurs only if the government takes the most "essential" property right. Gov't Br. 23. The government does not cite any decision of this Court in a physical taking case that turned on this factor, and Petitioners are aware of none. Whenever the government "'physically takes possession of an interest in property,'" it must pay

for what it takes, even if other interests remain. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012). The government's "most essential rights" test repeats the Ninth Circuit's error of conflating the separate categories of physical and regulatory takings. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

Loretto and *United States v. Causby*, 328 U.S. 256 (1946), among other cases, are irreconcilable with the government's test. The apartment building owners in *Loretto* retained the right to sell their buildings, to exclude all others from the apartments themselves, to redevelop the buildings for a different use, and to rent their units at market rates. Those are plainly the most essential property rights connected to an apartment building. Yet this Court held that a small, economically insignificant physical occupation of the building's exterior was a categorical taking requiring compensation. 458 U.S. at 438 & n.16. No one would consider the right to exclude planes from the airspace above a home to be the homeowner's most essential property right, yet this Court held the intrusion of government planes into that airspace a categorical physical taking. *See Causby*, 328 U.S. at 266. So too with the easements at issue in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which this Court presumed would have been taken categorically if the government had condemned them. *Lingle*, 544 U.S. at 546

In support of its assertion that permanent physical deprivation of property is not a per se taking unless the owner loses the most essential or economically valuable rights, the government cites a

handful of easily distinguishable cases. The regulation in *PruneYard Shopping Center v. Robins* required the owner of a shopping center to allow demonstrators, along with other members of the public, to use common areas the owner had "open[ed] to the public" subject to reasonable time, place, and manner restrictions. 447 U.S. 74, 77, 83-84 (1980). The regulation in *Bowen v. Gilliard* required applicants for welfare benefits to assign child-support "payments to the State, which will then remit the amount collected to the custodial parent" as welfare payments "to be used for the benefit of the entire family." 483 U.S. 587, 605 (1987). Neither case involved a permanent physical deprivation of possessory and dispositional control.

The government's reliance on Indian land cases is particularly inapt. Gov't Br. 38-40. The government in those cases was acting in its capacity as trustee. By virtue of its trusteeship, the government necessarily had control over the use and disposition of the properties in question. The cases cannot be generalized into the proposition that *Penn Central* balancing applies whenever the government *seizes* possession and control of previously private property and relegates the owner to a beneficial interest in the proceeds.

B. The Government Cannot Recast The Forced Physical Transfer Of Raisins As A Voluntary Exchange.

The government adopts a version of the Ninth Circuit's suggestion that the Marketing Order is best analyzed as a "use restriction." Pet.App. 23a. But the Order does not merely tell handlers when, where, or how many raisins to sell, Gov't Br. 16-17; it transfers

possession of reserve-tonnage raisins to the RAC, which sells or donates them and spends the proceeds largely on export subsidy checks to handlers. As this Court explained in *Loretto* and *Nollan*, the government's authority to restrict use of property in commerce does not extend to compelling surrender of portions of the property to the government. *See* Pet. Br. 49-50.

The government argues that it can demand the forfeiture of property as an entrance fee to the commercial market, subject only to rational-basis review. Gov't Br. 33. According to the government, federal confiscation of reserve-tonnage raisins is a permissible condition on "voluntarily entering the commercial market for raisins." *Id.* at 29. This Court squarely rejected that contention in *Loretto*, 458 U.S. at 439 n.17; *see also Koontz*, 133 S. Ct. at 2594-95; *Nollan*, 483 U.S. at 833 n.2. The government makes no attempt to square those decisions with its argument.

The government's argument is even broader than the "nexus and rough proportionality" test applied by the panel. Under the government's theory, it could not only force raisin handlers to relinquish a third of their raisins, but require drug manufacturers to turn over every third batch of their medicines or car manufacturers to let the government drive off with every other car off the assembly line, as a condition to doing ordinary business in the market. If creation of an "orderly market" is a "benefit" the government can condition on forfeitures of property, as the government argues, *see* Gov't Br. 29, there is no end to the confiscations the government could exact.

While ignoring the contrary authorities cited in our opening brief, the government grasps for support from two inapposite cases, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Monsanto*, the Court described the revelation of trade-secret information as a "voluntary submission" in "exchange" for the benefits of pesticide registration. 467 U.S. at 1007. The limited reach of *Monsanto*, however, was made clear in *Nollan*. Just as the government tries to do now, the *Nollan* dissent argued that the government's grant of permission to improve property (in exchange for a mandatory public easement across the property) was a government benefit constituting the sort of voluntary exchange upheld in *Monsanto*. 483 U.S. at 860 n.10 (Brennan, J., dissenting). This Court refused to apply *Monsanto* so broadly, explaining that "the right to build on one's own property ... cannot remotely be described as a 'government benefit,'" and so does not allow the government to demand property as part of the bargain. *Id.* at 833 n.2.

Nor is it a "government benefit" to permit raisin growers and handlers to sell their crop. The government cannot turn the threat of prohibiting an otherwise "routine" commercial activity — selling raisins — into a bargaining chip to obtain property without paying for it. *Id.*; *see also Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 676-77 (1st Cir. 1998). "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Koontz*, 133 S. Ct. at 2595.

The other case cited by the Government, *Yee*, involved a "rent-control ordinance" with *no* actual or threatened transfer of property to the government. Gov't Br. 30. By relying on *Yee*, the Government thus makes the same mistake the panel did in importing regulatory-takings jurisprudence into a physical-takings case. *See* Pet. Br. 18, 42. Far from "reflect[ing] the importance of voluntary action in determining whether a taking has occurred," Gov't Br. 30, *Yee* reaffirmed *Loretto* and explicitly held that *had* there been a physical transfer of property, the property owners "would have a right to compensation" and the city "might then lack the power to condition [their] ability to run mobile home parks on their waiver of this right." 503 U.S. at 531-32; *see* Pet. Br. 52-53. The Marketing Order mandates exactly the physical transfer of property that was missing in *Yee*.

The fact that raisin growers could hypothetically choose to "plant[] different crops," Gov't Br. 32, is irrelevant. The property owners in *Loretto*, *Nollan*, *Dolan*, and countless other cases of unconstitutional property exactions could all have elected different uses for their property too. If choice were relevant — outside the limited context of *Monsanto*-like "voluntary exchanges" — every one of those cases would have come out in the government's favor instead. *See Nollan*, 483 U.S. at 833 n.2. The fact that raisin growers are aware in advance of the Marketing Order makes no difference either, Gov't Br. 32, for the Government cannot reset owners' property rights simply by enacting a regulation prospectively requiring property to be handed over to the government in exchange for the government's permission to use remaining property in commerce.

The *Nollan* Court specifically rejected "the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights." 483 U.S. at 833 n.2.

Nor does it matter that producers theoretically have a voice in the RAC. Gov't Br. 32. *Every* property owner has some say (through voting, direct representation, or otherwise) in the democratic processes that might lead to legislation or regulation effecting a taking. Constitutional protections are a backstop when the democratic voice fails. Moreover, even the largest agricultural cooperative in the raisin industry, Sun-Maid, representing some 650 individual raisin farmers, has been unable to persuade the Secretary to intervene with the RAC and stop this counter-productive program. *See* Compl., *Sun-Maid Growers of Calif. v. USDA*, No. 1:15-cv-00496 (D.D.C.) (filed Apr. 6, 2015). According to Sun-Maid, "the process to update, amend, and modernize the Marketing Order 'has broken down.'" *Id.* ¶ 16.

Finally, the government half-heartedly defends the panel's application of the "nexus and rough proportionality" test of *Nollan* and *Dolan*. Gov't Br. 34-35. The government asserts that a mere volume restriction would be even worse than the taking because it would render excess raisins "'economically worthless,'" *id.* at 34, but that is not true at all. Instead of seizing the reserve raisins and selling them for its own purposes, the RAC could impose timing and market restrictions on handlers, as other market orders do, allowing the owners of the raisins to keep their own raisins and reap the proceeds. If conditions turned out to be as they were in 2002-03

and 2003-04, handlers could sell the entire crop for prices not much below, and in some cases above, the field price. *See* Supp.App. 1a-2a.

C. The Order Does Not Provide Compensation To Growers.

The government spills a great deal of ink arguing that the Marketing Order is a beneficent program under which the RAC acts in the interests of producers to sell their surplus raisins at the highest possible price, thus maximizing their returns. As a matter of law, those claims are no more than a distraction. As a matter of fact, they are false.

The supposed benefits of the reserve requirement have no bearing on the legal question of whether the raisin reserve requirement constitutes a taking. *See* Constitutional & Property Law Scholars *Amicus* Br. 18-20. Insofar as the benefits of the raisin reserve could be relevant to compensation in a condemnation proceeding or in a grower's claim for damages against the United States, which would strain the special benefits doctrine past the breaking point, the question of compensation is not at issue here. *This* case involves review of an unconstitutional fine, and the proper remedy is simply to reverse. *See infra* at 20-23.

Meanwhile, the government's idealized claims of producer benefits are belied by the record, including the government's own figures. Take the 2003-04 crop year as an example. That year, the field price for raisins (the price that handlers paid to producers for free-tonnage raisins, and the amount the USDA assessed the Hornes for their undelivered reserve-tonnage raisins) was $810 per ton. Pet.App. 41a. The government's brief tells us that according to the

Secretary's econometric model, the price would have been $63 per ton less without the reserve, or $747 per ton. Gov't Br. 10. This number has no support in the record and has not previously been cited in this litigation. We believe the $63-per-ton figure is greatly inflated.[2] But accepting the Secretary's calculation for heuristic purposes, a producer of 1,000 tons of raisins in that crop year could have sold them in an unregulated market for $747,000, from which should be deducted the state mandatory advertising fee of almost $5 per ton. Under the marketing order, however, the producer could sell only 70% of his crop, yielding $567,000. *See* Supp.App. 1a (noting a 30% reserve for 2003-04). He received nothing for his reserve raisins that year, *id.*, meaning he was worse off by $175,000.[3] This, again, is under the government's *own* numbers.

Contrary to the government's account of massive oversupply, *e.g.*, Gov't Br. 10, 43, the RAC was able to sell the vast majority of the reserve-tonnage

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[2] No academic study of the Marketing Order, including the study on which the government selectively relies, Gov't Br. 5 (citing Ben C. French & Carole Frank Nuckton, *An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins*, Am. J. Agric. Econ. 581, 592 (1991) ("French & Nuckton")), has found that the program increases grower profit over the long run. The government's authority, in fact, shows the opposite. *See* French & Nuckton at 592 (concluding, based on dynamic statistical model, that "grower net return ... averaged zero under the volume control program, suggesting that profits were not above normal" relative to an unregulated market, though prices were less variable).

[3] The corresponding number for 2002-03 is approximately $79,000.

raisins that year for more than the field price.[4] The RAC donated 2,312 tons to public uses like school lunches. Supp.App. 1a. It sold the remaining reserve raisins for a total of $111,242,849.17. *Id.* The RAC spent most of its total income — over $99,800,000 — on export subsidies, which benefit exporters only.[5] *Id.* It spent the rest on administrative costs, such as storage, fumigation, and transfer costs, as well as RAC expenses. *Id.* The government treats these costs as a benefit to producers, Gov't Br. 41 n.8, but when producers sell raisins to handlers, they receive the *full* field price; handlers bear their own processing and administrative costs. The result? The RAC took raisins that could have been sold in an unregulated market for $747 per ton, according to the government's own numbers, and paid producers nothing at all. *Id.*

2003-04 was a typical year in this respect. Returns to producers on reserve-tonnage raisins

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[4] Insofar as there was an oversupply, the Marketing Order may well have been the cause rather than a cure. *See* French & Nuckton at 592 (concluding that "[t]he average level of production was higher under volume control than for any of the no-control scenarios").

[5] The government asserts that export subsidies benefit producers but does not explain how. Gov't Br. 44. Export sales are part of the revenue pool for reserve raisins, but the value of that pool — zero in 2003-04 — has already been factored in. Presumably, removal of exported raisins from the domestic supply helps to prop up domestic prices, but the Secretary has already calculated the difference between domestic prices and estimated prices under an "unregulated scenario": $63 per ton. Any indirect benefit from exports is already subsumed in this figure, and should not be double-counted.

were also zero in 2005-06, 2006-07, 2007-08, and 2008-09. Pet. Br. 8-9. Although the RAC sold reserve raisins for tens of millions of dollars in every one of those years, it somehow managed to spend or give it all away.

Since 2008-09, there has been no raisin reserve even when the RAC's own econometric model has called for one, *see Sun-Maid Sends Initiative to Eliminate the Raisin Reserve*, Am. Vineyard, Jan. 2015, at 19 (noting that "[h]ad the 1949 established program been applied in 2013 for example, growers would have been compelled to put aside 37% of their crop"), yet the government points to no evidence of market disruption, oversupply, or price instability. On the contrary, growers have sold their entire crops, and the largest raisin grower cooperative has petitioned the USDA to end the reserve program altogether, pointing out that it is especially bad for smaller producers. *See* Dan Malcolm, *California Raisin Growers Benefit from Sun-Maid Work*, Am. Vineyard, Jan. 2015, at 18-19. No wonder the government relies on lofty statements of statutory purpose rather than the dismal results for producers as shown in RAC annual reports.

There is no call in this proceeding to quantify the effects of the Marketing Order (either in this Court or on remand), but to the extent the raisin reserve ever served a useful purpose, it has long since outlasted it.[6] Being outdated and counterproductive

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[6] The USDA has recognized the fact as to other agricultural programs which have been terminated in recent years. *See* Steven A. Neff & Gerald E. Plato, *U.S. Dep't of Agric., Federal Marketing Orders and Federal Research and Promotion Programs* 3 (1995); USDA, *Nectarines and Fresh Peaches*

does not make the Marketing Order unconstitutional, but the government should not be permitted to glide over actual uncompensated physical takings of property by easily-disproven claims of regulatory benefits.

The government's claim that Petitioners are seeking an "'unfair competitive advantage,'" Gov't Br. 54, and *Amicus* Sun-Maid's disparagement of the Hornes as "free riders," *see* Sun-Maid *Amicus* Br. 6, are misplaced. Marvin and Laura Horne have risked personal financial ruin in these proceedings for the purpose of breaking this archaic cartel on behalf of *all* raisin producers. They would gain the benefit of prevailing, to be sure, but bear the entire risk of failure as well. And others, including Sun-Maid's members, stand to benefit if they succeed. Sun-Maid's petition (and now lawsuit) urging the USDA to repeal the raisin reserve illustrates that they agree with that objective. They should be thanking the Hornes rather than opposing them.

II. THE GOVERNMENT'S ALTERNATIVE MERITS ARGUMENTS FAIL.

The government's assertion that the Tucker Act, which confers jurisdiction on the Court of Federal Claims to adjudicate monetary claims against the United States, *see* 28 U.S.C. § 1491(a), forecloses the Hornes' claims on the merits, requires little attention. It is foreclosed by this Court's decision in *Horne I*, is waived, and is wrong in any event.

Grown in California; Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011).

In *Horne I*, this Court concluded that Petitioners' claim is brought in their capacity as handlers as a defense to imposition of penalties in a USDA enforcement action. *Horne v. USDA*, 133 S. Ct. 2053, 2060-61 (2013). The Court held that "a takings-based defense may be raised by a handler in the context of an enforcement proceeding initiated by the USDA under § 608c(14)." *Id.* at 2063. That suffices to answer the government's argument.

To be sure, in a footnote the Court noted that a Tucker Act remedy may be available to "a *producer* who *turns over* her reserve tonnage raisins," *id.* at 2062 n.7 (emphasis added). As the government concedes, however, the Hornes are before this Court in their capacity as *handlers* who have *not* turned over raisins to the RAC. Gov't Br. 47-48 n.12. The footnote is thus irrelevant to this case.

The government's argument is also waived. The government raised the Tucker Act for the first time in this case in its response to Petitioners' 2011 petition for rehearing *en banc*, prior to this Court's review in *Horne I*. *See* U.S. Opp. to Pet. for Rehr'g at 6-8, *Horne v. USDA*, No. 10-15270 (9th Cir. Nov. 21, 2011). Although the government was entitled to raise the Tucker Act as a jurisdictional issue, it was far too late to raise new merits theories. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1173 n.35 (9th Cir. 2009) (court will not consider issue raised for the first time in *en banc* petition); *see also Horne I* Tr. 28:24-25 (Kagan, J.: "[Y]our Tucker Act argument as a substantive argument, I mean, has been waived."); *id.* at 48:22-:24 (similar). Nor is the Tucker Act argument within the scope of the Questions Presented. *See Limelight Networks, Inc. v. Akamai*

Techs., Inc., 134 S. Ct. 2111, 2120 (2014); *West v. Gibson*, 527 U.S. 212, 223 (1999) (citing *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999) (per curiam)); *see also* S. Ct. R. 24.1, .2.

The argument is also wrong. Congress specifically provided for appeal of USDA orders under the AMAA to the district courts, and there is no reason to think the general provisions of the Tucker Act would displace the specific provisions of the AMAA. Not only would the Hornes have to pay the full fine first and then sue to get it back — which would "make little sense" (*Horne I*, 133 S. Ct. at 2063) — but there is danger that the Court of Federal Claims would only have authority to award Petitioners compensation for the taken property, and not to reverse the unconstitutional civil penalty. That would fall short of being a full and adequate remedy. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978) (no need to pursue Tucker Act when claiming that a regulatory regime "does not provide advance assurance of adequate compensation").

Indeed, the government seems to be reverting to its standing argument, raised for the first time in supplemental briefing before the panel below, that Petitioners are complaining about the taking of "*someone else's* property." Gov't Br. 52 (emphasis in original); *see* U.S. Supp. Br. at 3-5, *Horne v. USDA*, No. 10-15270 (9th Cir. Aug. 13, 2013). Actually, Petitioners are complaining about a massive fine imposed on themselves personally, which surely they have standing to challenge. We would also remind the government that it was USDA who held that the Hornes "acquired" the raisins when they arrived at

their facility, and required the Hornes to bear the entire financial responsibility for the raisins. If this is a merits or prudential standing argument, the government forfeited it long ago, and in any event, *Horne I* permits Petitioners to challenge the entire fine in their capacity as handlers.

The upshot of the government's argument is that *even if the raisin reserve requirement is unconstitutional* — which would render monetary penalties on handlers unconstitutional in turn, *see Village of Norwood v. Baker*, 172 U.S. 269, 271 (1898); *Missouri Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 205-08 (1910) — there is no way for Petitioners to obtain relief. Gov't Br. 54. That is not what this Court held in *Horne I*.

III. THE PROPER REMEDY IS TO REVERSE.

The government's final argument is that if this Court finds that the Marketing Order effects a taking of reserve-tonnage raisins, it should remand for an accounting of just compensation. That request is puzzling on its face: Because the Hornes did not comply with the reserve requirement, no raisins or money have yet been taken. Pet. Br. 27. The accurate question is whether the fine imposed against Petitioners can survive a holding that an uncompensated taking of raisins (or their monetary equivalent) is unconstitutional.

Where property owners challenge a contemplated taking before it occurs and the regulatory regime does not contemplate compensation, the standard judicial remedy is to reverse the order that would constitute a taking, rather than to require the taking to be consummated and compensation paid. *See Dolan*, 512 U.S. 374; *Eastern Enters. v. Apfel*, 524

U.S. 498 (1988); *Hodel v. Irving*, 481 U.S. 704 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Missouri Pac. Ry.*, 217 U.S. at 205-208; *Village of Norwood*, 172 U.S. at 278. That approach in this case is most consistent with presumed legislative intent. The AMAA does not contemplate the expenditure of public funds in support of the Marketing Order, and paying for reserve raisins would defeat the purpose of the program. Under these circumstances, the proper remedy is not to remand for a calculation of compensation, but simply to reverse the order that requires an uncompensated taking.

Even if it were legally available as a remedy, the government's proposed remand would necessarily be futile. According to the government's theory, the Hornes have an obligation to disgorge the reserve-tonnage raisins processed at their facility, or their monetary value. Under the Fifth Amendment, Petitioners are entitled to compensation for any property they disgorge, likewise calculated at its monetary value. Whatever the effect of the Marketing Order on raisin prices might be, Gov't Br. 55, those two obligations are by definition equal and cancel each other out. No remand is necessary to see that Petitioners owe the government nothing.

Indeed, the USDA enforcement action underlying this case is analogous to a just-compensation proceeding in reverse. The government acted as if it were the rightful owner of the reserve-tonnage raisins processed at the Hornes' facility, and determined the monetary compensation it was due on account of the fact that Petitioners retained possession of the government's property. The USDA determined the value of the reserve raisins, and

imposed a fine precisely in that amount (plus civil penalties). The Hornes did not challenge that calculation as a measure of the value of the raisins, and it therefore stands as the adjudicated value. The government cannot now claim that the value of the raisins is something else.

Also in dispute are the civil penalties, but if the original order of uncompensated taking was unconstitutional, the fines are likewise unconstitutional. *Missouri Pac. Ry.*, 217 U.S. at 205-208. To allow imposition of civil penalties for invoking the statutory procedures to challenge an unconstitutional order would deprive Petitioners of their "right to refuse to submit to a taking where no compensation is in the offing," *Wilkie v. Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting).

On the penultimate page of its brief, the government proposes that on remand "it would be appropriate to consider what value *all of the raisins* would have had in the absence of the marketing order." Gov't Br. 55 (emphasis shifted). This utterly disregards the operative regulations. This action is a challenge to a USDA enforcement order under 7 C.F.R. § 989.166(c), entitled "Remedy in the event of failure to deliver reserve tonnage raisins." The regulation specifies that a handler that does not deliver reserve raisins must pay "compensation" measured by the quantity of undelivered raisins multiplied by the weighted average price received by producers for that year (*i.e.*, the field price). The regulation does not permit USDA to impose any other penalty, such as the supposed increase in market value of *other* raisins. Nor does the USDA have any inherent authority to perform such an

accounting. Although the government can cover the costs of public improvements through property assessments, *see Village of Norwood*, 172 U.S. at 278, we are aware of no authority allowing the government to simply estimate how much its acts hypothetically increased the value of property and bill owners for the difference.

The only question before the district court, and therefore the only question before this Court, is whether the order imposed on the Hornes was lawful. As the Ninth Circuit noted and the government concedes, "the constitutionality of the penalty rises or falls on the constitutionality of the Marketing Order's reserve requirement." Gov't Br. 15 (quoting Pet.App. 13a). Because the Marketing Order's reserve requirement is an uncompensated taking in violation of the Fifth Amendment, the penalty under review in this case must be reversed. Under the AMAA, there is nothing more for reviewing courts to do.

CONCLUSION

The reserve requirement is unconstitutional. This Court should so declare, reverse the court of appeals, and remand with instructions to remand to USDA to vacate fines imposed for noncompliance with the requirement to transfer reserve-tonnage raisins to the RAC.

Respectfully submitted,

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April 15, 2015